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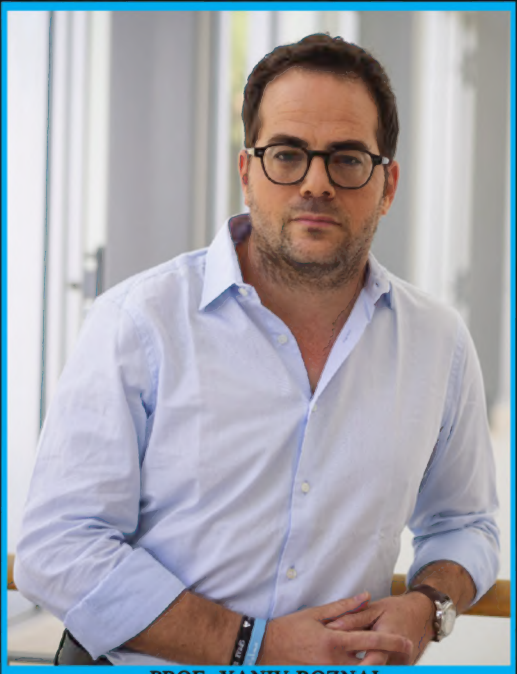
The Anglo-American LAWYER

MAGAZINE

PROF. SIR JEFFREY JOWELL, KCMG, QC
ON JUDICIAL REVIEW



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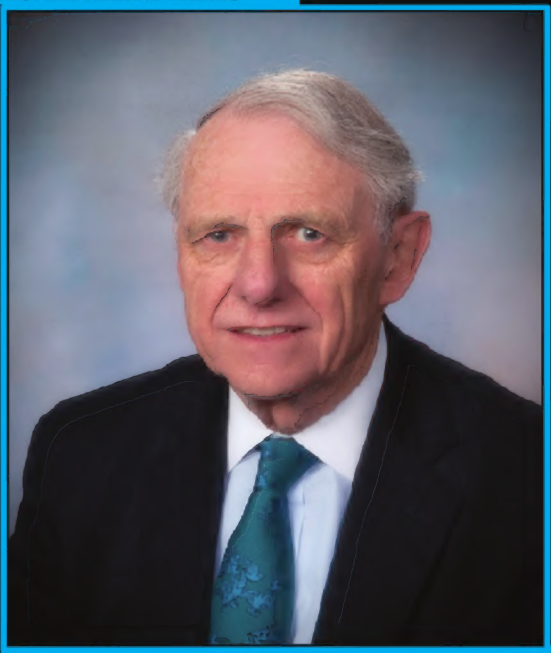

PROF. ROGER CLARK
ON INTERNATIONAL LAW AND NORMS

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EDITORIAL

The legislators articulate the policy and then give effect to it through legislation. In some cases the Executive drives the policy hence does not want any judicial interference. But the citizens invoke Judiciary if they find that the Executive had gone beyond the powers granted to it by the constitution. There have been many precedents in the Commonwealth countries. Sri Lanka is no exception. There has been legislation nullifying the judgments of the Superior Courts replicating the political implications of the decision of the *Burma Oil v. Lord Advocate*. Battle between the Judiciary and the Executive is a perennial struggle and will continue to be so.

We have had the benefit of interviewing a Senior British Lawyer, Prof. Sir Jeffrey Jowell, KCMG QC, who is a well-established authority on Administrative Law, on the latest developments involving ouster clauses. The *Anisminic v. Foreign Compensation Commission* is celebrated case law for any law student on the core issues concerning an ouster clause. The case posits the parameters on which a judge should determine a dispute if judicial intervention on the standard of the determination by the public authority has been barred. Sir Jeffrey was the lead counsel at the hearing of *Privacy International v. Investigatory Powers Tribunal* at which he could secure a favorable judgment in favor of the Privacy International. Sir Jeffrey has expatiated on his arguments deployed at the hearing at the UK Supreme Court.

Prof. Roger Clark of the Rutgers University - with extensive exposure in international law and diplomacy- has in his interview dispelled some of the misconceptions about the nature of work done by United Nations. We posed a particular question to Prof. Clark as there had been a popular conception that United Nations had failed to execute its mandate. Prof. Clark has strongly defended the good work of the UN as he has had direct engagement with the UN agencies.

We posed some key knotty issues concerning the constitutional amendments to Prof. Yaniv Roznai of the Harry Radzyner Law School, Interdisciplinary Center Herzliya, Israel. He is the Author of the *Unconstitutional Constitutional Amendments*. He has provided his critical thoughts on the issues confronting many countries on constitutional amendments.

A legal practitioner cannot grasp the meaning of law without having a firm grounding on Jurisprudence. Justice Oliver Wendell Holmes's *The Common Law* is considered one of the great intellectual achievements of the nineteenth-century America. We are grateful to Prof. Catherine Wells for expounding the deeper understanding of the life and work of the Great Dissenter. Prof. Wells has reimagined Holme's life and work in the context of American philosophical pragmatism of his time.

We believe that the February edition of the Magazine provides a fresh perspective on the Anglo-American legal tradition to which the Magazine is deeply committed. We look forward to the contribution by the scholars and practitioners so that Anglo-American legal momentum can be kept alive.

Srinath Fernando, LLM
Editor-In-Chief / Publisher

The Anglo-American LAWYER

Srinath Fernando, LLM
Editor-In-Chief / Publisher
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PROF. SIR JEFFREY JOWELL KCMG QC
ON JUDICIAL REVIEW

PROF. SIR JEFFREY JOWELL KCMG QC

Jeffrey Jowell is a practising barrister (Queen's Counsel) at Blackstone Chambers in London. From 2010-16 he was also the Founder-Director of the Bingham Centre for the Rule of Law. He is Emeritus Professor of Public Law at University College London (UCL) (where he was twice Dean of the Law Faculty and a Vice Provost) . He was knighted in the Queen's Honours List in June 2011 "for services to human rights, democracy and the rule of law". He has authored numerous leading publications in the area of constitutional and administrative law, including, with Lord Woolf (former Chief Justice of England and Wales) and others, , *De Smith's Judicial Review* (Sweet and Maxwell, 8th ed.), and jointly edits one of the most popular student work on the British Constitution, *The Changing Constitution* (OUP, 9th ed) .

He has been Visiting Professor in a number of countries and received honorary degrees from the Universities of Cape Town, Ritsumeikan, Athens and the University of Paris. He is an Hon.Fellow of UCL and Hertford College Oxford. He is a Bencher of the Middle Temple and a Commander of the National Order of the Southern Cross in Brazil. In his legal practice he has appeared in the highest courts of the UK and a number of Commonwealth countries and has advised on the constitutions and public law of several countries world-wide.

The AAL Magazine; Sir Jeffrey Jowell, you have published a series of authoritative books in administrative law which are now part of compulsory reading for law students at bachelors and masters level of many Commonwealth universities. *De Smith's Judicial Review* has become a classic in administrative law. A must reading for lawyers practicing public law. Tell us why do you think the power of the public officials be restrained by the courts under principles of judicial review.

Sir Jeffrey Jowell; There is no doubt that it is the role of government to make policy, but it is the role of the courts to ensure that government act withing the scope of their conferred powers, fairly and not unreasonably. That is what the rule of law requires. Some believe that a fairly elected government, representing the public will, should be able to do whatever they like without any constraints by "unelected judges". But surely we have learned the lessons of the twentieth century where popular governments (such as in Nazi Germany and the Soviet Union and elsewhere) acted in disregard of fundamental human rights and in an arbitrary

fashion. We now know that democracy is more than mere majority rule and requires constraints and limitations on even the most popular of governments.

The AAL Magazine; Do you think the concept of 'limited government' has no relevance when it comes to controlling a pandemic where all the liberal values of freedom of movement are restricted. What's your take on the plight of administrative laws during an extraordinary situation like a pandemic striking at the freedom of movement?

Sir Jeffrey Jowell; The concept of constrained or limited government I have outlined above of course does have relevance always. But there may be exceptions in respect of certain rights (not all, for example the right not to be tortured should be absolute). One of these exceptions is public health, which applies in the case of a pandemic. But even where these exceptions may apply, they must be carefully justified by the government and not be imposed in a disproportionate way.

The AAL Magazine; As you are practicing QC, do you see that there will be a sea change in judicial attitudes when it comes to interpreting and re-igniting the values of English law with the advent of Brexit. Do you think the British Judiciary should do away with the European jurisprudence that had taken pre-eminence during the UK's membership with the EU.

Sir Jeffrey Jowell; No I don't think that. I think the values of English law enriched European jurisprudence in the area of both EU law and European human rights law. And vice versa.

The AAL Magazine; Sir Jeffrey, the London Times newspaper called you the Lawyer of the Week when you appeared in the case: *Privacy International v The Investigatory Powers Tribunal* and secured a judgment which was in line with the celebrated *Anisminic v. Foreign Compensation Commission* on ouster clauses. Could you briefly outline what arguments did you drive at the UK Supreme Court? This has far reaching consequences to the greater Commonwealth and Anglo-American law.

Sir Jeffrey Jowell; This was a case where the legislation forbade the decisions of a tribunal, even decisions "as to whether they have jurisdiction" to be challenged in any court. We argued that it is the essence of the rule of law that a person has access to a court of law to challenge a decision of any public body. As in the *Anisminic* case, the Supreme Court held that even the broad words of the legislation in this case could not act as an ouster of the function of the courts to consider the lawfulness of the tribunal's decision. This is because when Parliament confers powers on a body, it (Parliament) sets the limits and scope of that body's jurisdiction, and it is not for the body itself to go outside their four corners In other words, the tribunal had no power to determine the scope of its own limited jurisdiction. And the ouster clause was not broad enough to preclude the courts from judging the extent of that jurisdiction.

The AAL Magazine; In the backdrop of this *Privacy International* case, how would you see Parliamentary sovereignty and the application of the rule of law through the courts' supervisory jurisdiction?

Sir Jeffrey Jowell; As Dicey said, Parliamentary sovereignty has always been tempered by the rule of law. He considered them both to be constitutional principles of the highest order. In *Privacy International* the Supreme Court was protecting both parliamentary sovereignty (parliament determines the scope of the tribunal's powers, which it cannot evade or extend on its own), and the courts are the guardians of the rule of law.

The AAL Magazine; Do you think the rule of law is a universal concept, or just for the old democracies?

Sir Jeffrey Jowell: The rule of law is so misunderstood, partly because it does not allow of a snappy definition because it consists of four elements or ingredients: First, legality: We must all obey the law, and this includes public officials who must act within their given powers and not arbitrarily. Second, Certainty: Law must be clear, applied prospectively and accessible. Laws can of course change, but with due warning. Third, Equality: Law must be applied equally between the powerful and the marginalised. Fourth, Access to Justice: Here we have the principle that all must be able to challenge decisions made against their interests, with a fair trial before an independent judiciary.

I think it is condescending to say that all or indeed any of those elements or ingredients of the rule of law are only for the developed world, or the North rather than South, or for old rather than new democracies. I do believe they are universal values and am concerned that they are being ignored, violated or abandoned in so many parts of the world (including sometimes, alas, the developed world).

Sir Jeffrey Jowell; The concept of constrained or limited government I have outlined above of course does have relevance always. But there may be exceptions in respect of certain rights (not all, for example the right not to be tortured should be absolute). One of these exceptions is public health, which applies in the case of a pandemic. But even where these exceptions may apply, they must be carefully justified by the government and not be imposed in a disproportionate way.

PROF. ROGER CLARK
ON INTERNATIONAL LAW & NORMS

Prof. Roger S. Clark

Roger S. Clark recently retired after teaching at Rutgers Law School in Camden, New Jersey, for 49 years. A New Zealander by birth, he studied law at Victoria University in New Zealand and Columbia Law School in New York. His teaching has concentrated on International Law, Human Rights, International Criminal Law, Foreign Relations Law and domestic Criminal Law. He has published widely in these areas. He represented the Government of Samoa in the negotiations to create the International Criminal Court and to get it up and running.

The AAL Magazine; Professor Clark, you have had a distinguished career in both public service of the New Zealand, with international organizations and also in academic world. You had a very impressive practical exposure in international law related issues Tell first Professor, whether the United Nations has been able to achieve its mandate on many issues on a global scale. Do you think the United Nations has been able to achieve much of what the League of Nations could not achieve. If so could you cite some examples?

Prof. Roger Clark; First of all, thank you for inviting me to contribute in this new magazine that promises to be an exciting publication. I am certainly not one of those who deems the United Nations a failure. It is true that it has not been able to prevent some major conflicts (the United States war on Vietnam or the Coalition-of-the-Willing invasion of Iraq, for example) but it has been instrumental in confining or solving many other dangerous situations. Its peacekeeping efforts, at least since the 1990s, have saved countless lives. So too have its humanitarian works like that of the UN High Commissioner for Refugees and UNICEF. As a scholar of human rights I would single out the impressive normative work that the organization has done such as the Universal Declaration of Human Rights, the Covenants on Human Rights, the Convention against Torture, standards for the criminal justice system, and the treaties on elimination of discrimination based on race and sex. Then there are the various mechanisms created to promote and protect those rights, including the High Commissioner for Human Rights (which was the subject of my doctoral dissertation at Columbia Law School in the late 1960s). The creation of the International Criminal Court, with the United Nations as the midwife, represents a significant addition to the architecture of international law and international organizations, even if some major players have declined to come

aboard. The Sustainable Development Goals are lifting millions of people out of poverty and despair. I should add that when I speak of the United Nations, I always include the Specialized Agencies and other organizations with close relationships with the UN. That family of organizations, even if structured by separate constitutive instruments contribute in major ways to the maintenance of a peaceful and decent society. Think of the work for example of the WHO and the elimination of smallpox to say nothing of its work in other areas. The International Labor Organization, which, like the League of Nations, was set up by the Treaty of Versailles, is a substantial success story between the wars and in its modern incarnation as a UN Specialized Agency. It had contributed a normative structure for workers' rights and pushed hard for the right to organize and, if need be, to strike.

The AAL Magazine; As you are aware both Russia and China are two permanent members of the United Nations Security Council and are also founding members of the United Nations. Do you find rule based behavior in the international area has been hampered by the conduct of Russia in annexing Cremia and China in annexing some of the islands in the South Pacific. Do you see an increased erosion of rule based behavour and how does it impact the countries in the Pacific. China has made claims to some of the islands and other countries too have claimed the sea. Do you think that the United Nations has lost its influence in asserting the Members countries to respect the territorial claims of other countries.

Prof. Clark; I do see assaults on the rule of law in the two situations you mention. And, like others, such as Vietnam and Iraq, they undercut the Charter prohibitions on the use of armed force. There are many others, especially denial of rights to self-determination that are endemic on the international scene. I attribute many of those situations to the cynicism of the way major players like the United States has prevented Western Sahara from attaining self-determination. And, despite the best efforts of serious UN public servants, Palestine is still stymied in its approach to self-determination. Successive Secretaries-General have never been given any authority to execute the contribution that the organization could perhaps make. That is no reason for giving up. I am ultimately an optimist. Sometimes the wheels of diplomacy grind for a long time before there is a successful resolution. I think , for example, of the ultimate independence of Timor—Leste which rested substantially on the patient efforts by dedicated international civil servants.

The AAL Magazine; Professor, China has not recognized the decision of the Permanent Court of Arbitration which it delivered a judgment in favor of Philippines. How would you respond to a situation when one powerful Member of the UN does not recognize a judgment of an institution – though not part of the UN – but PCA had been endorsed by the General Assembly of the UN with an Observer Status? Does this not have a bearing on the Customary International Law where nation states are bound to honor. There have been a confrontational attitude by Russia along the national borders of Ukraine and an invasion was expected and the situation is still evolving. China has been threatening Taiwan and has been sending their military jets closer to the Taiwan Defence Zone quite frequently. I have not seen an emergency session of the UN Security Council. Why has the UN played a very passive role in preventing the wars? Do you think there is an

issue with the international legal order when a powerful country feels that it has the wherewithal to subdue smaller nations?

Prof. Clark; At the Conference in San Franscico when the UN Charter was being finalized, small countries such as Australia, and New Zealand were adamantly opposed to the veto power for the Big Five. The major players sneered at them and explained that they either accepted the veto or there was no UN. This large-power attitude is entrenched and comes out in situations like the ones you mention. Professor Jennifer Trahan has recently argued that some of the excesses of the veto power, especially in cases of egregious human rights violations, can be reined it on the basis of other limited in the Charter and contemporary international law. But enforcing the law against the major players is difficult. It is hard to mount a military offensive in such cases – at least since the Korean war, which was a special case in view of the Soviet boycott of the Security Council. And sometimes it seems impossible even to shame the shameless.

The AAL Magazine; As you know Taliban's rapid takeover of Afghanistan has caused immense political and operational challenges for the UN. This has also caused some issue for international law as it was not clear which government was in control. The international law is not very clear over who controls what. The collapse of the Afghan government has raised questions about whether UN and other humanitarian agencies can continue to function safely under the Taliban Government. It was not clear whether protection of diplomatic agents were under whose custody. There was complete confusion when the Taliban took over. Given the current state of affairs, how would you distinguish the state of the sovereignty in Afghanistan in the eyes of international law?

Prof. Clark; There is no question that Afghanistan is a sovereign state. The question is who is to represent it on the international scene, both in its bilateral relationships and at the UN. I can understand the urge not to regard them as a legitimate government bilaterally and to leave the seat in New York unoccupied. Frankly, however at this stage of the game there is no alternative to dealing with the Taliban which is firmly in power. There is no conceivable current alternative to its position. Regardless of the issue of formal recognition, there is great need at this point for the relevant humanitarian agencies to negotiate, however, ambiguously, to gain entry to the country and stave off a massive humanitarian crisis that is likely to be a threat to the peace in the whole neighborhood.

The AAL Magazine; Professor, the Covid-19 pandemic has had a devastating impact on the freedom of movement and governments had to control human behavior with an iron glove. Some of the basic freedoms guaranteed in the Constitution which were derived from the Universal Declaration of Human Rights UDHR, had to be curtailed by many of the governments of the world including my own own country where Armored Forces had to be deployed to control the movement of people as the pandemic spread so rapidly. What is your take on the freedom of movement in a pandemic whether you agree with the governments that tough measures are required to contain a pandemic?

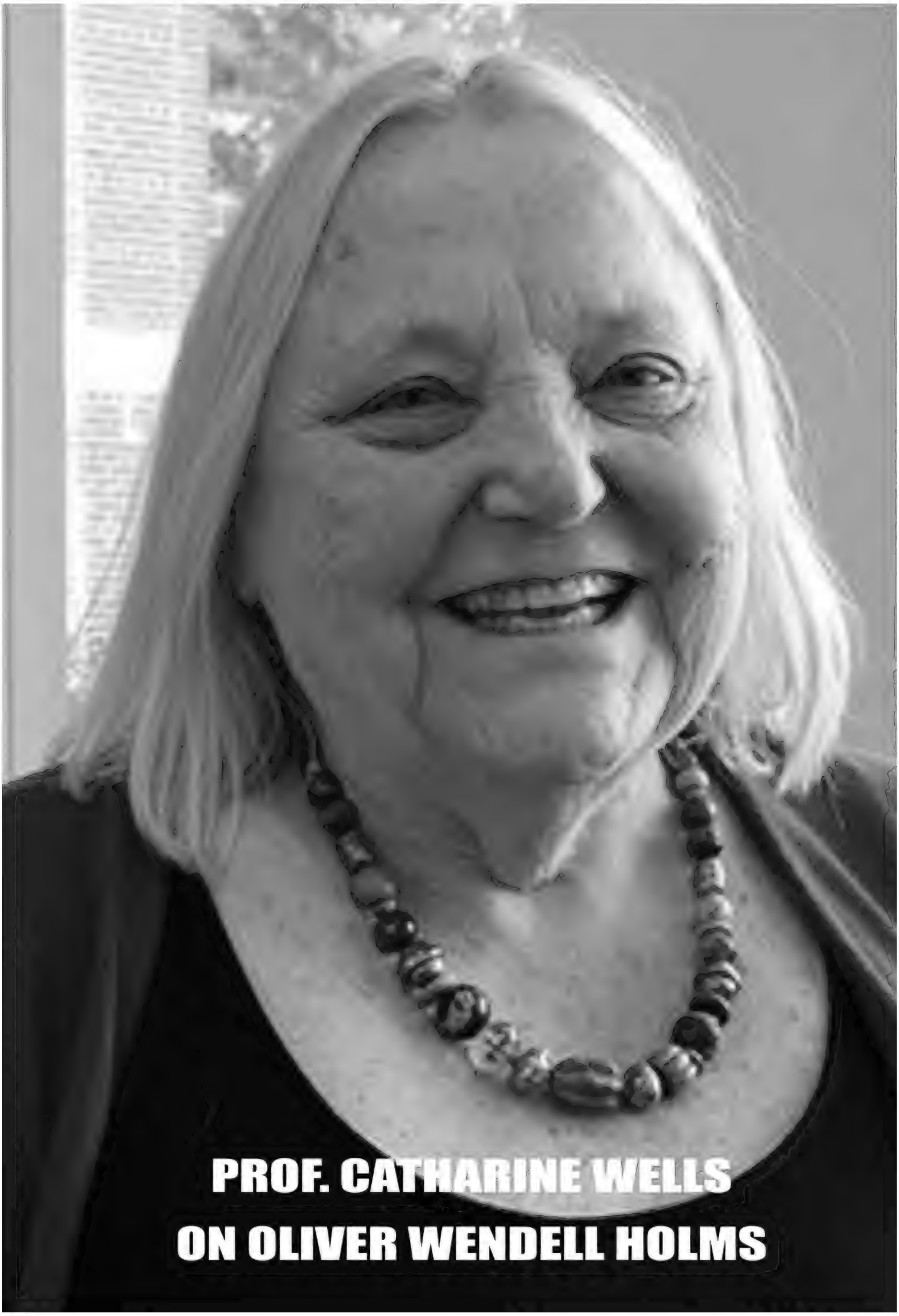
Prof. Clark; The Constitution of the World Health Organization asserts that "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." This should be the starting point in dealing with the current pandemic. And John Stuart Mill long ago provided the framework for dealing

with any putative conflict of rights here. To paraphrase him, "your right to jeopardize your own health by not being vaccinated stops at the point when you endanger the remainder to the community (the world community for that matter)."

The AAL Magazine; The one area which I observed was the joint search and rescue operations when a disaster takes place in the international waters, you may recall when Malaysian Airlines Flight 340 disappeared in the Indian Ocean, there was a lack of cooperation and coordination of the countries in the search and rescue operation. I feel that the UN must come up with a draft convention on the joint search and rescue operations when a disaster takes place. It could be an aviation incident, a fire onboard a ship or a joint rescue etc. A country like Sri Lanka with limited naval assets is unable to cope with an accident involving a very large crude carrier – ULCC/VLCC or a gas carrier. Do you think the UN should play a bigger role in drafting a new convention on demarcating areas of state responsibility and financial compensation for such efforts.

Prof. Clark; I admit that I had not thought about this particular problem but it is an example of something basic in the modern world; there are some issues that no state and especially a small, can possibly solve on its own, climate change, public health, terrorist and other transnational crimes. For example – and the atrocity crimes that generated the need for the International Criminal Court. So these are the kinds of issues on which international organizations should be engaged. I think that the particular organizations that might address the issues you raise are the International Civil Aviation Organization and the International Maritime Organization which have specific mandates to deal with issues like this.

Prof. Clark; At the Conference in San Franscico when the UN Charter was being finalized, small countries such as Australia, and New Zealand were adamantly opposed to the veto power for the Big Five. The major players sneered at them and explained that they either accepted the veto or there was no UN. This large-power attitude is entrenched and comes out in situations like the ones you mention. Professor Jennifer Trahan has recently argued that some of the excesses of the veto power, especially in cases of egregious human rights violations, can be reined it on the basis of other limited in the Charter and contemporary international law. But enforcing the law against the major players is difficult. It is hard to mount a military offensive in such cases – at least since the Korean war, which was a special case in view of the Soviet boycott of the Security Council. And sometimes it seems impossible even to shame the shameless.


PROF. CATHARINE WELLS
ON OLIVER WENDELL HOLMS

Prof. Catharine Wells

Catherine Wells is a Professor of Law and Law School Fund Research Scholar at Boston College Law School, where she teaches and writes in various areas of legal theory, including Pragmatic Legal Theory, Feminist Jurisprudence and Civil Rights Theory. In addition, she teaches a class in American Philosophy in the College of Arts and Science. She is a nationally recognized expert on Pragmatism and its relationship to American legal theory. Prof. Wells has taught at a number of law schools including those at the University of Southern California, Stanford University, the University of Arizona and the University of Utah. Her law review articles have been published in many journals including the *Harvard Law Review*, the *Michigan Law Review*, *University of Southern California Law Review*, and the *Northwestern Law Journal*.

Professor Wells has also held many positions of leadership within the academic community. In addition to previously serving as Associate Dean for Academic Affairs at the BC Law, she has served as Chair of the Association of American Law Schools Section on Tort and Compensation Systems, and the Section on Teaching Methods. She has organized numerous symposia, including one on Neo-Pragmatism in American Law, which was published in the USC Law Review. She has also been elected to membership in the American Law Institute. She has authored a magnificent book about the Great Dissenter, Oliver Wendell Holmes, Jr and the pragmatic tradition in American Law.

Prior to entering law teaching, Prof. Wells served as an Assistant Attorney General and Director of the Division of Public Charities for the state of Massachusetts. In the area of charities law, she has a national reputation based upon her service as past President of the National Association of State Charities Official as an advisor to the Commissioner of the Internal Revenue Service with respect to the Non Profit Organization; and as a participant in many panels and symposia on nonprofit law.

Professor Wells received her law degree Magana Cum Laude from Harvard Law School. She also earned an MA and PhD in Philosophy from the University of California Berkeley. Her dissertation was titled *Peirce on Logic; the Phenomenological Bases of Normative Science.* Her undergraduate degree was received from Wellesley College.

The AAL Magazine; *Professor Catharine Wells, I have had the benefit of reading your brilliant book on a legend in American legal history. What drove you to write a book on Oliver Wendell Holmes?*

Prof Wells; First, thank you for your kind words and for the opportunity to share my views on Holmes. I had two reasons for writing on Holmes. The first was a matter of personal history. I began my academic career in philosophy where my field of specialization was American pragmatism and specifically the philosophy of Charles Peirce. Holmes was a member of the group that formulated pragmatism; and thus, when I turned to law, his work represented a natural place to begin my study of jurisprudence. More importantly, however, was the fact that I saw Holmes as a one of the primary creative forces in American law. He had an unusually long career on the bench. He was a judge on the Massachusetts Supreme Judicial court for over thirty years and then served another twenty on the Supreme Court of the United States. During his tenure on the Massachusetts court, he played an important role in retrofitting the common law to the requirements of a new age, and his time on the Supreme Court was equally consequential. The growth of the federal government changed the nature of federal/state relations forcing corresponding adjustments in American constitutional law. All In all, fifty years on the bench gave his work a kind of continuity and coherence that enhanced the importance of his individual views.

In addition, I was particularly interested in the fact that Holmes's reputation

transcended legal boundaries. His life spanned two centuries, and he was

involved in all the great events of that era – from serving in the Union Army during the Civil War to adjudicating the important questions raised by Roosevelt's New Deal. In conversation, he had a tendency to shock and surprise. His lively sense of humor made him a desirable guest and produced legendary stories of his wit. The public perceived him as being intelligent, learned, and wise. Ultimately, he came to represent the value of these qualities in solving society's problems.

The AAL Magazine; *Why do you think Justice Holmes is unique among a brand of other justices produced by the U.S Supreme Court.. What really inspired you?*

Prof. Wells; What really inspired me was his energy. The obstacles he encountered never slowed him down. He never gave up on his aspiration to live each day to the fullest. He was an intellectual who was equally drawn to practical achievement and philosophical speculation. The result was a life of great originality.

The AAL Magazine; *You referred to in your book, Justice Holmes's sense of reductionism which could be a rare talent among learned justices. Could you elaborate by citing some examples?*

Prof.Wells: In the *Path of the Law*, Holmes expounds what he calls a predictive theory of law. Law, he thought, should not be understood as a series of abstract propositions that could be interpreted independently of their context. Instead, the meaning of a legal doctrine was found in its effects on legal decision-making. For example, a student completely understands the doctrine of res ipsa loquitur when (s)he can predict its consequences for legal decision-making. Thus, Holmes rejects the idea that we understand legal doctrines when we can list out a series of synonyms that seem to capture its meaning. Instead, its meaning is reduced to a set of practical consequences.

The AAL Magazine; *Your research also touches on Justice Holmes's infatuation with the Buddhist Philosophy which is a dominant religion in Sri Lanka and Buddhism has survived and natured in Sri Lanka for more than 2500 years. This is quite interesting. Could you share with us his extent of appreciating Buddhist values and how it contributed to his legal career? This has some resonance to your claim that he had a sense of reductionism which is also part of Buddhist*

teaching of the 'correct understanding and mindfulness'.

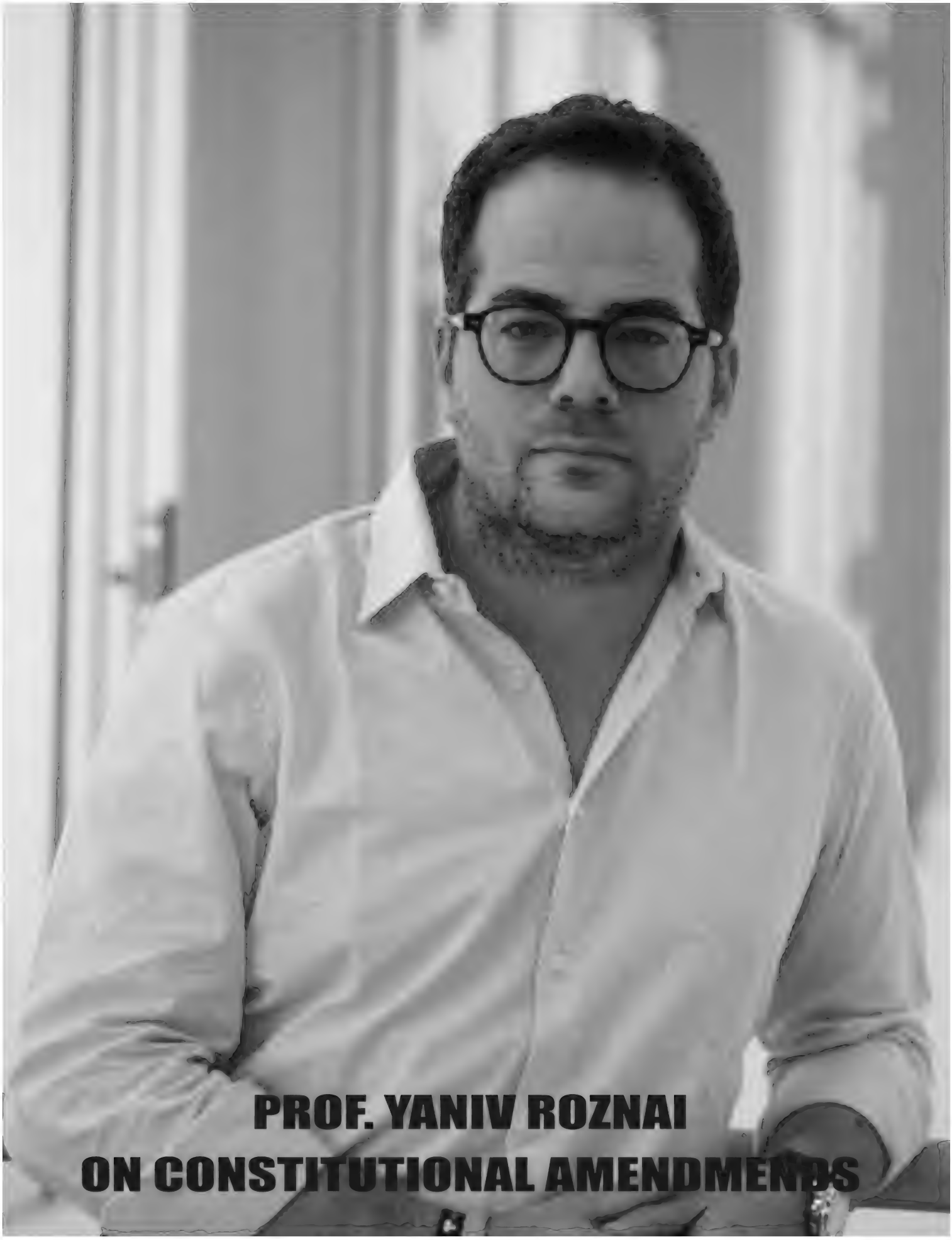
Prof. Wells; Holmes was profoundly moved by the transcendentalism of Ralph Waldo Emerson. Emerson believed that the world of sensation should be understood as a metaphor suggesting a deeper reality that exists below the surface of ordinary experience. If we take ordinary experience literally, the most we can learn will be the principles that allow us to predict the course of future experience. Deeper truths come from a more wholistic view, such as the one that Emerson described in this well-known passage: "Crossing a bare common, in snow puddles, at twilight, under a clouded sky, without having in my thoughts any occurrence of special good fortune, I have enjoyed a perfect exhilaration. I am glad to the brink of fear. In the woods too, a man casts off his years, ... In the woods, we return to reason and faith. ... Standing on the bare ground, — my head bathed by the blithe air, and uplifted into infinite space, — all mean egotism vanishes. I become a transparent eye-ball; I am nothing; I see all; the currents of the Universal Being circulate through me; I am part or particle of God".

To my eye, this is not Buddhism. For one thing, Emerson is immersed in sensory experience. But there is a certain commonality. The import of the passage is that we are not the person that is presented in sensory experience. Rather we exist as spiritual beings that are part and parcel of a universal presence.

Holmes, like many New Englanders, did not talk much about religion, but he often referred to Emerson as the greatest influence on his life. Ironically, the main effect of this view was a rejection of the idea that secular law was based on natural law. Many western religions think of God as a separate being that governs the physical world. Thus, it makes sense to them that man's law should emulate the law of God. But, following Emerson, Holmes would have understood natural law as something more far more profound than the rules that govern human affairs.

The AAL Magazine; *If I may venture into the Justice Holmes' magnum opus his Book The Common Law published in 1881, do you think that his dictum 'The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed'. Don't you think this is a stinging vindication of the constitutional theory that the Constitution must be reflective of the current realities of the society?*

Prof. Wells; Yes, I do. In fact, Holmes is often identified as the father of American realism precisely because of statements like the one you quote. I think, though, that this is somewhat misleading. Realism comes in many different stripes. In the extreme, there are realists who claim that the law is whatever the judge says it is. They believe that the judge has unlimited discretion to decide cases in accordance whim and to justify their decisions by manipulating legal doctrine. I do not think that Holmes is a realist in this sense. There is a lot of distance between extreme realism and the kind of formalism that Holmes was rejecting. Holmes thought the formalist was wrong in suggesting that cases could be decided by the application of logic and legal doctrine. But equally, he thought that judges were bound by their oath to follow the law. This is not a contradiction. For Holmes, the law was more than legal doctrine. He recognized that law exists in a context of commerce and culture and that a decision that frustrated the operation of these legitimate forces would not be good law. He also thought that common law decision-making had its own set of norms that these too must be observed by a conscientious judge. Thus, a Holmesian judge was not free to impose her own views on the case at bar. Instead, (s)he was bound to conform her decision to a number of different factors.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Prof. Yaniv Roznai

Yaniv Roznai is an Associate Professor at the Harry Radzyner Law School, Interdisciplinary Center (IDC) Herzliya. He holds a PhD and LL.M (Distinction) from The London School of Economics (LSE), and LLB and BA degrees (Magna cum Laude) in Law and Government from the IDC. In 2015-2016, Yaniv was a Post-Doc Fellow at the Minerva Center for the Rule of Law under Extreme Conditions, University of Haifa and at the Hauser Global Law School, New York University (NYU). In 2013, he was a visiting researcher at the Program in Law and Public Affair (LAPA), Princeton University. He was a Visiting Professor at the University of Milan in Italy, Mae Fah Luang University in Thailand, University of the Basque Country in Spain, Koç University in Turkey and Emory University in the United States.

Prof. Roznai is a Co-Chair of the Israeli Section of the International Society of Public Law (ICON-S) and an elected member of the Council of ICON-S. He is the Co-Founder of the Israeli Association of Legislation and was a Co-Chair between 2017-2020. He is an elected board member and former secretary general of the Israeli Association of Public Law. His scholarship focuses on comparative constitutional law, constitutional theory, legisprudence, and public international law. His publications appeared in journals such as The American Journal of Comparative Law, International Journal of Constitutional Law, International and Comparative Law Quarterly, Connecticut Law Review, Maryland Law Review, Michigan State Law Review, Global Constitutionalism, The Theory and Practice of Legislation, Jus Politicum, Vienna Journal on International Constitutional Law, Stanford Law and Policy Review, Wisconsin International Law Journal, European Review of Public Law, German Law Journal, Law & Ethics of Human Rights, European Journal of Law Reform, Jerusalem Review of Legal Studies, William & Mary Bill of Rights Journal. Prof. Roznai's research was presented in leading universities such as Yale, Harvard, Oxford, Princeton, Stanford, UC Berkeley, NYU, Texas, Cornell, Indiana, Washington University St. Louis, Hong Kong University, National University Singapore, Queen Mary, LSE, EUI, Edinburgh and Dublin. His studies were cited in decisions of the Grand Chamber of The European Court of Human Rights, The Federal Supreme Court of Brazil, The Colombian Constitutional Court, The Constitutional Court of Uganda, The Constitutional Chamber of the Supreme Court of El Salvador, The Constitutional Court of Slovakia, The Constitutional Tribunal of Chile, The Constitutional Tribunal of Peru, Court of Appeal of Kenya and The Supreme Court of Israel. In 2015, Prof. Roznai was awarded the 2014 Thesis Prize of the European Group of Public Law for his PhD dissertation. His book, "Unconstitutional Constitutional Amendments - The Limits of Amendment Powers" was published in 2017 with Oxford University Press – Constitutional Theory Series.

In 2018 it was awarded the Inaugural International Society for Public Law (ICONS) Book Prize (and shortlisted for the Hart-SLSA Theory and History Book Prize). His book "Constitutional Revolution", co-authored with Prof. Gary Jacobsohn, was published with Yale University Press in 2020. Prof. Roznai was awarded the 2018 Israeli Association of Public Law Gorni Prize for Young Researchers, the 2019 Justice Cheshin Prize for Excellence in Legal Research for Young Researchers, and IDC Excellence in Teaching Award for 2018. He was also included in 2019 TheMarker's list of Israel's 40 under 40 in the category of researchers, and in 2020 was selected as 'man of the year in legal academy' by the 'Court Magazine". In 2021 Prof. Roznai was awarded the "Knight of Government Quality 2020" award, by the Movement for Quality Government in Israel.

The AAL Magazine; Professor Yaniv Roznai, you have published a magnificent book on *Unconstitutional Constitutional Amendments* by the Oxford University Press. I presume you must have upgraded and revised your Doctoral thesis you pursued at the London School of Economics. You have delved deep into comparative constitutional law. Could you tell us first what exactly is constituent power.

Prof. Roznai; Thank you so much for this kind invitation. Constituent power is the driving power behind constitution-making. Constituent Power, as a branch of constitutional law, involves legal theory at its highest level. However, whereas constituent power remained a subject frequently dealt with within European continental and Latin America scholarship, in Anglo-American legal debates it somehow sank into slumber; in the UK obviously due to the absence of a written constitution and in the American debates probably owing to the stability of the 1787 Constitution and the prevailing approach of American constitutionalism, which assumes that after the establishment of the Constitution, Art. V, through which "the people" may amend the Constitution, contains the constituent power, and therefore, constituent power did not really play any direct role in American constitutionalism.

In the modern era, a nation's constitution is regarded as receiving its normative status from the political will of "the people" to act as a constitutional authority, as holders of constituent power. The locus of ultimate source of legitimacy is thus bottom-up, originating in "the people". Nonetheless, such vague phrase conceals many complexities, such as "who are the people?" "How do we recognize them?" "Through which mechanisms can the people speak in one voice?" These are all challenging questions that constitutional theory aims to grapple with. There are of course different modalities of exercise of constituent power, and experience in different countries indicates a wide variety of options as to the arenas for constitution-making, such as expert commission, parliamentary enactment, executive diplomacy, constituent assembly, popular initiative and referenda.

In my book, I argued that we must distinguish between two types of constituent power: the people's primary constituent power which is the absolute power to establish a new legal order and secondary constituent power or amendment power which is a delegated power that acts within the constitutional framework and is limited under the terms of its mandate. Accordingly, the amendment power must obey those explicit unamendable provisions stipulated in the constitution. In other words, unamendable provisions create a normative hierarchy between constitutional norms. Moreover, the constitutional amendment power cannot be used in order to destroy the constitution from which its authority derives. The amendment process is the internal method that the constitution provides for its self-preservation; by destroying the constitution, the amending power undermines its own raison d'être. Similarly, as every constitution consists of a set of basic principles that structure the 'spirit of the constitution' and its identity, and the alteration of the constitution's core results in the collapse of the entire constitution and its replacement by another, consequently, the amendment power cannot be used in order to destroy the basic principles of the constitution.

Constitutional amendment is not constitutional replacement. Replacing the constitution with a new one is the role of the people who retain the primary constituent power; and through its exercise they may shape and reshape the political order and its fundamental principles. The theory of unamendability thus restricts the amending authorities from amending certain constitutional fundamentals. Unamendability does not block all

the democratic avenues for constitutional change, but rather merely proclaims that one such avenue, namely the formal amendment process, is unavailable. It makes sure that certain constitutional changes take place through a channel of higher-level democratic deliberations, popular-democratic or consensual rooting. Understood in this way, the theory of unamendability is a safeguard of the people's primary constituent power.

For me, constitutional amendment powers are situated in a grey area between the ordinary legislative power and the extraordinary primary constituent power where a spectrum of amendment power exists. Some amendment procedures are governmental amendment powers in the sense that the amendment process is similar, or relatively similar, to the ordinary legislative process in terms of the organs involved and the temporal and procedural constraints. Others, which significantly deviate from the ordinary legislative process with regard to these features, are popular amendment powers in the sense that their exercise resembles, or almost resembles, a constitutional moment which is nearly an invocation of the primary constituent power. It is a process that seeks the awakening of the people to reassume its rules as constitution-makers. The more the amendment process resemble the invocation of primary constituent power the wider its scope should be.

The AAL Magazine; Your mention that the closer the amendment process resembles the exercise of primary constituent power the wider its scope. This brings the question, is the exercise of primary constituent power limited in any way? What if the people want a dictatorship or to undermine fundamental rights and principles.

Prof. Roznai; This is an extremely timely question for me, as I am now working on a new book, tentatively called "We the Limited People: Constituent Power and the Boundaries of Constitution-Making". In this book, I argue that the very concept of constituent power may carry certain inherent limitations, by the fact that at the basis of the theory of constituent power is the collect voice of the people.

In other words, constituent power is the power of the people to create and recreate their constitutional world. The conception of a democratic constituent power means that it must be committed to popular sovereignty. This, I believe, may carry both procedural and substantive limitations on the primary constituent power. Procedurally, one may argue that in order for the constituent power to be direct, the forms of its exercise must have a special character, i.e. separate from other public functions, thereby replacing revolution with peaceful means incorporating actual, deliberate, free choice by society's members. Constituent power should be grasped as a means for realizing a well-deliberated and thoughtful change. While it is true that there can be no precise algorithm for its exercise, a legitimate exercise of constituent power should be inclusive, participatory, and deliberative. After all, the word *constituere*, Andreas Kalyvas reminds us, marks the act of founding together, jointly.

From substantive point of view, an important aspect is the maintenance of freedoms such as freedom of speech, free and fair election, freedom of assembly and association etc', that are so necessary for the future exercise of constituent power. Likewise, Walter Murphy for example contended that there are certain limitations even "on the constitutive power of the people as whole". Basing his argument on John Stuart Mill's rejection of a person's right to sell him to slavery, Murphy claims that even if the whole population agreed to destroy the democratic order and replace it with a new order that would deny them democracy's basic values, this might be prohibited in order to protect themselves and future generations.

Therefore, in order to be legitimately exercised, those rights which form the basis of constituent power must be protected. The exercise of constituent power cannot result in the abolition of rights such as freedom of expression and assembly, and political rights, which are necessary in order for constituent power to reappear in the future.

Moreover, the exercise of constituent power must be consistent with the idea of "the people." An exercise of constituent power that results in the alienation of groups in the society undermines the very raison d'être of constituent power. Constituent power must be committed to popular sovereignty. If "the people" or some parts thereof are excluded from the polity and are no longer able to exercise constituent power, this should influence the legitimacy of the constitution-making process. One cannot use "constituent power" in order to undermine the very notion of "constituent power." This limitation is of course one of legitimacy, not of legality.

Another approach would be through principles of constitutionalism. Constitutions are a means, not goals themselves. Therefore, an emerging approach may well be that constitutionalism and constitutions are inseparably linked so that an exercise of constituent power which would undermine principles of constitutionalism would not automatically bind society. Recall Art. 16 of the French Declaration of the Rights of Man of 1789 that puts it bluntly: "A society in which the guarantee of rights is not assured, nor the separation of powers provided for, has no constitution." This is a conceptual argument. Just as a chair requires certain features to be considered a chair, so thus a constitution must include certain features in order to be described as a constitution. In other words, in order to be legitimately exercised, constituent power must ensure certain basic principles of constitutionalism. In my book I explore these various approaches.

The AAL Magazine; Professor, you have mentioned that 'constitutions ought to be sufficiently flexible to allow future generations to respond to various political, economic, social, and other changes, as well as changes in the society's system of values. Constitutions that do not allow for such adaptations are in peril of becoming irrelevant' and you went on to say that if the constitution cannot be amended to suit the needs of the society is doomed to become an instrument which does not serve its purpose. How is this statement relevant to the American Constitution which had remained stagnant for 200 plus years. What advise would you give to the American polity. Should the American Constitution undergo radical changes to meet the needs of the society? Why do you think a debate on this has not been ignited? In our inaugural issue we have called for a National Conference on the Review of the American Constitution. What's your take on this?

Prof. Roznai; I believe that any amendment formula should have the right balance between flexibility and rigidity. What exactly is this right balance is a difficult question, not only because the rigidity of amendment process depends on many difference factors such as thresholds, the number of veto players, and what Ginsburg & Melton call the 'amendment culture'. So formal amendment rules are not the only determining factor with regard to constitutional change. What may matter even more to the rigidity or flexibility of a constitution than voting thresholds or temporal limits is the amendment culture in a constitutional tradition, meaning the attitude regarding the attractiveness of constitutional amendment, independent of the political or social pressure for change and regardless of the substantive issue under consideration. Constitutional rigidity, in other words, is not merely a matter of institutional

design but also a matter of attitude and fact. Consider the UK which is considered a flexible constitution, as aforementioned, as changes to laws even of constitutional nature does not require any special process. Nonetheless, the constitutional culture obliges actors to show self-restraint in handling constitutional matters which makes the constitution a de facto rigid constitution. So, is it a formally flexible but effectively a rigid constitution.

As for the US Constitution, Article V's process is unusually onerous and time-consuming in light of its demanding consensus requirements of both a two-thirds vote in both houses of Congress and ratification by three-quarters of the State legislatures. it is certainly considered as one of the most – if not the most – rigid constitutions in the world. I believe it is too rigid. It is almost impossible to legally amend the constitution, and constitutional change must then be brought by other informal means such as judicial interpretation, political practice or sub-constitutional norms. Of course, Article V includes an alternative constitutional convention route for amendments, which has never been used. Indeed, critics such as Sanford Levinson, have argued that the amendment procedure is the main democratic defect of the US Constitution.

Comparative constitutional design demonstrates that there is no single unified method or process for amending constitutions. Constitutions present different degrees of amenability in terms of the rigidity and flexibility. Constitutions have different procedures, mechanisms and veto players in the amendment process. If I was a constitution-drafter, I would incorporate different procedures for amending different provisions and principles, such as the Constitution of Ecuador which provides different procedures for 'amendment', 'partial reform' and 'total reform'. Dixon and Landau term this 'Tiered constitutional design' in which the default rule is a flexible amendment procedure yet certain constitutional provisions, which are more important for the constitutional order, are given higher levels of entrenchment and are more difficult to amend. Likewise, there is what Richard Albert terms 'second order unamendability' – Such a constitutional design represents a mixed model between rigid and flexible amending formula.

The AAL Magazine; Professor, recently, you have been admitted as an amicus curiae by the Supreme Court of Kenya, in the famous BBI case. This is an appeal of the Court of Appeal's ruling from August 2021, in which the court upheld a ruling from the High Court that had found the constitution amendment bill of 2020 – aimed to implement the Building Bridges Initiatives (BBI) - unconstitutional and void for violating the basic structure of the constitution and for not complying with various procedural requirements stipulated in the amendment procedures (Art. 255-257). Now, the process for amending the 2010 Constitution of Kenya constitution is not similar to ordinary legislation and it is not solely in the hands of the legislator but involves, the people themselves, through the popular initiative under Article 257 and as ratifiers of the amendment, in a popular referendum, if the amendment relates to any of ten matters that are listed in the constitution, Hence, in contrast with many other countries like India, where the basic structure doctrine was applied, the amending process is controlled by the legislature. In such cases, where the distinction between primary and secondary constituent power is much clearer, the argument for limitations on the amending power and for judicial review of the process are much stronger. But what if the people are included in the process like in Kenya? Is the amendment power limited?

Prof. Roznai; The Kenyan case is indeed a fascinating one, for constitutional theory and comparative constitutional law. Does the mere

fact that the amendment procedure stipulated in the constitution of Kenya is a popular one means that implied limitations such as the basic structure doctrine do not apply? I believe that this complicated question should be answered in the negative. In other words, the amendment power in Kenya is limited by the basic structure doctrine, as there is a distinction between primary constituent power and the people included in the secondary constituent power.

True, in some countries, where the people were involved in the process of amending the constitution, courts have held that they do not have the authority to intervene. In Ireland, for example, when the Supreme Court faced a challenge to constitutional amendments regarding Termination of Pregnancies, it rejected a claim that natural law was superior and antecedent to the Constitution, holding that the people, not God, are the creators of the Constitution and the supreme authority. Hence, constitutional amendments made by the people become the fundamental and supreme law of the land, and the judiciary will not interfere in an amendment adopted by the people in a referendum. Similarly, in France, in 1992, the Conseil Constitutionnel specified that, subject to the temporal and substantive restrictions provided in the Constitution, the constituent power is sovereign. From this statement, it was clear that the amendment power has to observe substantive unamendability imposed upon it by the Constitution. This anticipation, however, vanished in 2003 when the Conseil Constitutionnel laconically held that it has no competence to conduct judicial review of constitutional amendment.

In contrast, in Switzerland, in 1996, both chambers of the Federal Assembly declared a popular initiative to amend the Constitution, invalid, for violating the internationally recognized peremptory prohibition of refoulement. In its report on the initiative, the Federal Council stated that respecting the fundamental norms of international law is inherent to the principle of 'rule by law', and violation of said norms would undermine the rule of law and cause the State and the influenced individuals irreversible damage. Later, in 1999, Switzerland granted explicit constitutional recognition to the proposition that jus cogens norms of international law were a limitation to constitutional amendments, even when the people are involved.

Although not engaging directly with a formal amendment, a recent statement by the Slovak Constitutional Court may be of use in that respect. On July 7, 2021, the Slovak Constitutional Court found a referendum initiative on an instant election unconstitutional. In its judgment, the Constitutional Court held that "when people use referenda, they act as a constituted and not constitutive power, which is why they cannot break the material core of the Constitution." The people themselves are directly involved but they are exercising a power under the constitution and limited by it . I agree with this approach.

Likewise, in a case from Lithuania from 2014, the Constitutional Court emphasized the duty of a citizens' initiative group for a referendum to submit to a referendum only draft amendments to the Constitution that would observe substantive constitutional limitations. It emphasized that substantive limitations imposed on the alteration of the Constitution are equally applicable in the event of the alteration of the Constitution by referendum.

And, as a final example, very recently in Peru, in a recent decision from November 2021, Peru's Constitutional Tribunal held that when the people speak democratically in a referendum, It does not do so as a legally unlimited power, but as a constituted power, and therefore limited, essentially, by respect for the Fundamental Standard. So, the court acknowledges that even

when the people are involved in constitutional reform they are subject to material limits and the court has authority to review such amendments.

It is in that respect important to mention some of the many well-known difficulties associated with referendums, such as the designation of the individuals who qualify to participate; the drafting of the ballot question; the lack of knowledge of the voters; fear of tyranny of the majority; and the historical associations of the use of plebiscites as tools for supporting authoritarian regimes. Thus, some, such as Prof. Abat Ninet, claim that ratification in a referendum is insufficient: 'the legitimacy and validity of the constitution requires not only popular ratification, but also real (or true) democratic involvement. A constitution made through ordinary parliaments and representatives is unacceptable'. This understanding refuses to reduce primary constituent power to a mere acclamation –

a 'soccer-stadium democracy', according to which the people's constitution-making power may only expresses itself in a yes or no answer. Process matters. And the people's educated and rational and deliberative involvement throughout the process matters. In other words, for constitutional moments to truly manifest the people's will, popular participation in constitutional moments should be before, throughout, and after the constitution-making process and not be limited to a solely 'yes' or 'no' vote in a referendum. As I have stated elsewhere, it is the manifestation of 'we the people', not simply 'oui, the people.

So, a constitutional amendment produced by a popular referendum is still controlled by the constitution. According to this approach, 'the people' may be regarded in two distinct capacities: as a source of absolute power (primary constituent power) – that may create a new constitutional organ, and as a constitutional organ established by the constitution for its amendment (secondary constituent power). On this account it appears that when the people have a role – via a referendum—within the amendment process, such an exercise does not represent the primary constituent power. Thus, even a popular amendment power still acts as a delegated authority – a constitutional organ, and thus limited and may be subject to judicial review. Yet, this limitability – as the mirror picture of the spectrum of the amendment power – is not one-dimensional rather has a scope: the more the amendment is the product of inclusive and deliberative democracy, the less intensive should be the judicial review of the constitutional amendment . The constitutional amendment power is limited even when exercised directly by the people. The people in that capacity of inclusion in the amendment process represent a legal organ of the state. As there can be no sovereign within a constitutional political order, the power of the people is necessarily limited. And that was the bottom line of my Amicus Brief for the Kenyan Supreme Court.

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The Anglo-American LAWYER

MAGAZINE

An Appeal to the Deans of the American Law Schools

NATIONAL CONFERENCE ON THE REVIEW OF THE AMERICAN CONSTITUTION

The American constitution had remained stagnant for over 200 years. The American dream and the way of life has transcended far beyond what the framers had anticipated. The challenges America is facing today are formidable and wide ranging from terrorism, climate change, cyber security, nuclear attack, and the open defiance of the rule based behavior by some of the America's rivals in the international arena. There are multiple global challenges that are still evolving. The framers of the American constitution could not possibly have imagined the magnitude of the challenges America is confronting today. *The Anglo-American Lawyer* Magazine is calling for a national conference on the review of the American constitution to delve deep into the contours and intricacies of the constitutional provisions and on what impact it had in the past or could possibly have in the future on achieving the Great American Dream. We believe that the Congress must provide the Executive sufficient leeway to deal with global challenges and the immediate review of the War Powers Act to deal with America's archrivals – perhaps at hypersonic speed.

OVER TO THE DEANS OF THE AMERICAN LAW SCHOOLS.

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